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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SYLVESTER MOSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

## QUESTIONS PRESENTED

1. Whether, in a prosecution for bank robbery, the district court erred in not instructing the jury on the offense of bank larceny.

2. Whether the district court abused its discretion in admitting evidence of petitioner's prior bank robbery conviction.



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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-14) is reported at 126 F.3d 200.

## JURISDICTION

The judgment of the court of appeals was entered on September 18, 1997. A petition for rehearing was denied on December 15, 1997. The petition for a writ of certiorari was filed on November 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Pennsylvania, petitioner was convicted on two

counts of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to concurrent terms of 210 months. The court of appeals affirmed. Pet. App. 3-14.

1. On November 9, 1995, petitioner entered the First Fidelity Bank at 1008 Madison Avenue, in Patterson, New Jersey, approached teller Monica Brown and displayed a sign reading "hold up." Brown became very scared and nervous. After petitioner placed his hands on the counter, petitioner said, in a demanding tone, "can I have all your money?" Brown gave petitioner some "bait money." Petitioner threw that money back at her. Feeling very scared, Brown gave him more money. Petitioner then left the bank. Brown reported the robbery to a supervisor. Pet. App. 6; C.A. App. 158-163; Gov't C.A. Br. 3.

On November 20, 1995, petitioner entered the First Fidelity Bank on Fifth Avenue in Patterson, approached teller Janet Neufville, told her, "this is a hold up," and asked for big bills first. Petitioner also made a gesture to his coat as if he had a weapon. Neufville became so upset that she lost bladder control. She threw some money on the counter and then immediately walked towards the bathroom. Neufville was "hysterical" and told another teller that she had just been robbed. Pet. App. 5-6; C.A. App. 130-134.

That same day, FBI Special Agent John Conway arrested petitioner. During an interview, petitioner admitted that he and an accomplice had just robbed a bank. Conway seized some of the bank's money from petitioner's socks. Gov't C.A. Br. 4-5.



2. Petitioner's defense at trial was that he committed only bank larceny, rather than bank robbery, because he did not use force, violence, or intimidation to obtain funds from the banks. On cross-examination, Agent Conway agreed that he could not see force or violence on the November 20 surveillance tape, which showed petitioner robbing the second bank. Agent Conway also stated that he could not "pinpoint" intimidation on the tape, but emphasized that the tape was "not a true depiction" of the events in the bank, in part because it lacked audio. C.A. App. 198-199, 212. Agent Conway did, however, testify that a still photograph from the November 20 tape showed petitioner with his right arm inside his jacket, which was consistent with the teller's testimony that petitioner had made a gesture to his coat as if he had a gun. Id. at 213-214.

The Reverend Louis McDowell testified that he was standing behind petitioner during the November 20 robbery and that he did not hear petitioner say anything to the teller, make any motions, or do anything that could be characterized as force or violence. He admitted that the teller was nervous as she gave petitioner the money. C.A. App. 265-266, 268.

At the close of evidence, petitioner asked for a bank larceny instruction. The district court denied the motion, stating that the evidence did not warrant such an instruction. Pet. App. 8. In particular, the district court held that no reasonable juror could conclude that the tellers had handed petitioner money voluntarily rather than as a result of intimidation:

> There are simply no facts in evidence to justify a bank larceny charge. . . . Clearly there is no basis to suggest that this money was taken with the compliance of these tellers. . . . The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in [Section] 2113[(b)].

Pet. App. 8 (quoting C.A. App. 298); see also C.A. App. 293 ("This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers.").

3. The court of appeals affirmed. On appeal, petitioner challenged the failure to give a bank larceny instruction, contending that bank larceny is a lesser included offense of bank robbery. Under Fed. R. Crim. P. 31(c), he argued, he was entitled to an instruction on the lesser included offense.

The court of appeals disagreed, holding that bank larceny is not a lesser included offense of bank robbery. The court of appeals explained that, in Schmuck v. United States, 489 U.S. 705 (1989), this Court had held that the determination of whether one offense is a "lesser included" or "necessarily included" offense of another depends on the elements of the offenses. Where the lesser offense requires proof of an element not required for the greater offense, it is not a lesser or necessarily included offense, and no instruction is required under Fed. R. Crim. P. 31(c). Pet. App. 8.

Applying Schmuck, the court noted that bank robbery does not expressly have an "intent to steal or purloin" element, but that bank larceny does. Nor is an "intent to steal or purloin" element



implied in bank robbery. The court emphasized that, under circuit precedent, the subjective intent of a bank robber is irrelevant; it is sufficient if he resorts to force, violence, or intimidation to achieve his purposes. Pet. App. 8-10. The court recognized that robbery and larceny were greater and lesser offenses at common law, but found no indication in the legislative history of Section 2113 that Congress intended to codify that common law rule in the statute, especially since the bank robbery and bank larceny provisions were adopted at different times. Pet. App. 11-12. The court of appeals noted that cases from other circuits had language suggesting that bank larceny is a lesser included offense, but ultimately concluded that its analysis was consistent with Schmuck. Pet. App. 12-13.

Petitioner also argued that the district court erred in admitting evidence of his prior bank robbery conviction under Rules 404 and 403 of the Federal Rules of Evidence. The court of appeals summarily rejected that contention. Pet. App. 4 n.1.

ARGUMENT

1. Petitioner contends that bank larceny is a necessarily included offense of bank robbery, and that he was therefore entitled to a bank larceny instruction. Pet. 9-11. According to petitioner, there is a circuit conflict on whether the offense of bank larceny is necessarily included in the offense of bank robbery. Id. at 8.

a. As an initial matter, this case does not present an appropriate vehicle for deciding whether bank larceny is a lesser

included offense of bank robbery, because petitioner (like virtually every other bank robbery defendant) would not be entitled to a bank larceny instruction even if bank larceny were a lesser included offense.

Fed. R. Crim. P. 31(c) provides, in part, that a defendant charged with a greater offense "may be found guilty of an offense necessarily included in the offense charged." Rule 31(c) thus may entitle a defendant to a lesser included offense instruction, but only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. Keeble v. United States, 412 U.S. 205, 208 (1973). Here, the district court properly concluded that no rational jury could find petitioner guilty of bank larceny without also concluding that he was guilty of bank robbery. Pet. App. 8.

Petitioner's contrary claim, correctly rejected by the district court, rests on the assumption that a jury could find that he obtained funds from the banks with intent to steal them -- and thus was guilty of bank larceny -- without also finding that he used intimidation to obtain the funds. Despite petitioner's attempt to solicit witness testimony that they could not "see" intimidation, the evidence showed that intimidation occurred.[1]

[1] Petitioner held up a sign in the first bank saying it was a hold up, United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir.), cert. denied, 464 U.S. 963 (1983), and threw bait money back at the teller; in the second bank, he gestured to his coat in a way that suggested that he had a concealed gun. See pp. 2-3, supra. Moreover, the evidence showed that both tellers were terrified. One lost control of her bladder, and both testified as to their fear. Pet. App. 36-37.



More important, as the district court properly concluded, no reasonable juror could find otherwise, as there was no evidence to suggest that the tellers handed petitioner thousands of dollars in bank money voluntarily and of their own free will, i.e., without intimidation. Certainly there was no evidence that the tellers were petitioner's accomplices. Pet. App. 8 ("Clearly there is no basis to suggest that this money was taken with the compliance of these tellers"). Nor was there evidence that petitioner filled out a withdrawal slip or performed any other act that would cause a teller voluntarily to hand him cash. C.A. App. 293 ("This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers."). To the contrary, the evidence can support only one conclusion: Far from handing petitioner thousands of dollars voluntarily and of their own free will, the tellers handed petitioner the money he demanded because they were intimidated. Pet. App. 8; C.A. App. 293, 298. Because no reasonable juror could reach the contrary conclusion, no bank larceny instruction was required even assuming that bank larceny is a lesser included offense of bank robbery. Ibid.[2]

[2] Because the same analysis will generally apply in bank robbery prosecutions, the question of whether bank larceny is a lesser included offense of bank robbery is largely academic. Cases in which bank robbery defendants are able to present plausible evidence that the tellers handed over money voluntarily, i.e., without intimidation, are infrequent at best. It thus comes as no surprise that the vast majority of cases that even mention this issue uphold the trial court's refusal to give a bank larceny instruction on the ground that it is not supported by the evidence. See notes 5-6, infra (citing cases that reject bank larceny instruction as unsupported by the evidence).

b. In any event, the court of appeals properly rejected petitioner's contention that bank larceny is a "necessarily included" offense of bank robbery within the meaning of Fed. R. Crim. P. 31(c). In Schmuck v. United States, 489 U.S. 705 (1989), this Court held that the test for determining whether one offense is a "necessarily included" or "lesser included" offense of another is the statutory "elements" test. Under that test:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716.

Under the "elements" test, bank larceny is not a lesser included offense of bank robbery because bank larceny has a statutory element that bank robbery does not. 18 U.S.C. 2113(a) declares that, "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take * * * any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association" is guilty of bank robbery. In contrast, 18 U.S.C. 2113(b) declares that anyone who "takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or in such savings and loan association" is guilty of bank larceny.



Thus, unlike bank robbery, bank larceny has an express "intent to steal or purloin" element.[3] As the court of appeals explained, an intent to steal or purloin means an intent "permanently to deprive the rightful owner of the property." Pet. App. 9 (emphasis added); see United States v. Goldblatt, 813 F.2d 619, 625 (3d Cir. 1987). Consequently, one who takes property from a bank with an intent to return it -- and thus who has no intent to "steal or purloin" -- does not commit bank larceny. In contrast, bank robbery lacks the "intent to steal or purloin" element, and thus one who takes bank property by force or intimidation commits bank robbery whether or not there is an intent to retain (or return) the property. Instead, the hallmark of bank robbery is the use of force or intimidation to acquire the property, and the fact that a robber may not intend to keep the property, or may subjectively intend to return the property, is irrelevant. Pet. App. 9; United States v. Brown, 547 F.2d 36, 39 (3d Cir. 1976) (same), cert. denied, 431 U.S. 905 (1977); United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir. 1980) (same), cert. denied, 450 U.S. 924 (1981);

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[3] That is not the only additional element. The bank larceny statute requires the defendant to "take[] and carr[y] away" the property, while bank robbery requires only that the defendant take the property or attempt to take it; thus, actual possession of the property and carrying it away are not elements of bank robbery, whereas they are elements of bank larceny. In addition, the bank larceny statute requires that the property be worth more than $1,000, while the bank robbery statute does not.

United States v. DeLeo, 422 F.2d 487, 491 (1st Cir.) (same), cert. denied, 397 U.S. 1037 (1970).[4]

Because the offense of bank larceny contains an element that is not required for proof of bank robbery -- an intent to steal or purloin -- it is both definitionally and legally not a "necessarily included" or "lesser included" offense of bank robbery. Pet. App. 9-10. Accord United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989) ("Bank larceny * * * contains a specific intent element which need not be proved in the bank robbery context * * *. We thus hold that bank larceny cannot be 'necessarily included' in bank robbery."). See also Schmuck, 489 U.S. at 716-717 (Rule 31(c) requirement that lesser offense be "necessarily included" in the greater one requires that proof of the elements of the greater offense necessarily prove all the elements of the lesser offense).

c. Although the court below expressed the view that circuit law on this question is not necessarily uniform, the decision below is consistent with post-Schmuck holdings. See, e.g., United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989). Indeed, those courts of appeals that have suggested that bank larceny is a lesser

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[4] The clearest guide to the elements of the offenses, of course, is the language of the statutes. Because the bank robbery provision does not expressly require an intent to steal or purloin, this Court ordinarily will not read such an element into the offense. See Bates v. United States, 118 S. Ct. 285 (1997) (specific intent to injure or defraud is not an element of the offense of misapplication of funds); United States v. Wells, 117 S. Ct. 921 (1997) (materiality is not an element of false statement to a federal bank offense). This is especially so where, as here, Congress expressly includes an element in one part of a statute but excludes it from another. Russello v. United States, 464 U.S. 16, 23 (1983).



included offense of bank robbery have done so primarily in dictum or in cases decided before Schmuck.

For example, the Fifth Circuit, United States v. Flint, 534 F.2d 58, 60 (5th Cir.), cert. denied, 429 U.S. 924 (1976), and the Eighth Circuit, United States v. Cady, 495 F.2d 742, 747-748 (8th Cir. 1974), have both suggested that bank larceny is a lesser included offense of bank robbery. Those decisions, however, were reached before this Court explained the proper mode of analysis in Schmuck. Before Schmuck, many circuits did not determine whether an offense was "necessarily included" by looking at the elements, but rather by looking at the "relationship" between the interests that the offenses sought to protect. 489 U.S. at 715-716. As a result, pre-Schmuck cases cannot be considered authoritative and are subject to reconsideration in light of Schmuck. See, e.g., Gregory, 891 F.2d at 734 & n.1 (rejecting pre-Schmuck circuit precedent because the circuit's "inherent relationship' test * * * [was] rejected by the Supreme Court * * * in favor of the 'elements' test").

The more recent decisions cited by the court of appeals -- including those from the First Circuit, United States v. Henson, 945 F.2d 430, 440-441 (1st Cir. 1991), the Fourth Circuit, United States v. Walker, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 116 S. Ct. 2513 (1996); and the Eleventh Circuit, United States v. Cornillie, 92 F.3d 1108, 1109 (11th Cir. 1996) -- do not analyze whether bank larceny is a lesser included offense of bank robbery under Schmuck. Instead, they merely assume (or state) that it is,

and go on to reject the defendant's claim of error on other grounds.[5] Because those cases do not actually analyze whether bank larceny is a lesser included offense of bank robbery under Schmuck, and because their results in no way turned on the answer to that question, their references to bank larceny as a lesser included offense are mere dicta.[6]

Finally, the Tenth Circuit's decision in United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994), is so badly fragmented -- there is no majority opinion -- that it is difficult to tell whether it will have any vitality inside the Tenth Circuit, or be followed outside of it. In that case, two members of the panel agreed with the Third and Ninth Circuits that, under Schmuck, bank larceny is not a lesser included offense of bank robbery. Pet. App. 10 n.3; see Brittain, 41 F.3d at 1412-1415 (opinion of Brown, D.J.); Brittain, 41 F.3d at 1416-1417 (Baldock, J., dissenting). But the panel vacated the conviction for failure to give a larceny instruction nonetheless because the district court judge who wrote the lead opinion felt compelled to follow pre-Schmuck circuit precedent despite his belief that it was wrong. 41 F.3d at 1412-1416 (opinion of Brown, D.J). Given that Brittain has no majority opinion -- and inasmuch as a majority of the judges on the Brittain panel expressed views consistent with the decision below -- it would be premature to conclude that Tenth Circuit law irreconcilably conflicts with the Third Circuit's decision in this case.

Thus, the only circuits that have squarely decided whether bank larceny is a lesser included offense of bank robbery under Schmuck, the Third Circuit below and the Ninth Circuit in Gregory, agree that it is not. The contrary dictum in pre-Schmuck decisions and the fragmented decision of the Tenth Circuit in Britain do not evidence a genuine circuit conflict on this question or otherwise make it worthy of review at this time. Instead, further development in the court of appeals on this issue, in light of Schmuck, is warranted.

2. Petitioner also contends (Pet. 11-16) that the district court abused its discretion by admitting evidence of his prior bank robbery. That fact-bound issue merits no further review.

At trial, the district court admitted a prior state conviction record showing that in 1991 petitioner used intimidation to rob the

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[5] Thus, Henson, 945 F.2d at 440-441, assumed that bank larceny was a lesser included offense, but upheld the conviction because the issue had not been preserved. Cornillie, 92 F.3d at 1109-1110, similarly assumed that bank larceny was a lesser included offense, but held that the instruction was not warranted because the evidence would not support it. In Walker, the court considered the question "undisputed," 75 F.3d at 180 (citing pre-Schmuck precedent), but (as in Cornillie) held that the evidence at trial could not support a larceny instruction, ibid. In addition, in United States v. Sandles, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996), the Seventh Circuit referred to bank larceny as a "lesser included crime" in passing but -- as in the other cases -- did not rely on that passing remark in resolving the matter before it. To the contrary, Sandles was a sentencing appeal and the result in no way hinged on whether bank larceny was a lesser included offense of bank robbery.

[6] The Sixth Circuit has left the issue open. See United States v. Perry, 991 F.2d 304, 310-311 (6th Cir. 1993) (declining to address the appellant's contention that bank larceny is a lesser included offense because no rational jury could find that the teller handed money to the defendant voluntarily).

First Fidelity Bank on Madison Avenue to counter petitioner's argument that he did not knowingly or purposefully use intimidation during the instant offenses. The court carefully instructed the jury to consider that conviction on the issue of intimidation and not for any other purpose. C.A. App. 352-353.

Fed. R. Evid. 404(b) provides that evidence of a defendant's other bad acts is not admissible to prove his character to show that he acted in conformity therewith, but that it is admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. Here, the district court properly admitted the prior conviction because it was relevant and probative to show that petitioner's intent was to steal money from banks by intimidation, and because it undermined any claim that the intimidation was accidental or unintended. Simply put, evidence that petitioner had successfully used intimidation to rob banks in the past undermined his claim that he planned to do so this time merely by being polite and courteous, or that his intimidation of the tellers was unplanned or accidental.

Nor did the admission of the prior conviction violate Fed. R. Evid. 403, which authorizes a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of it causing unfair prejudice. Here, the evidence of the prior robbery conviction was not inflammatory, nor was it likely to provoke an unduly emotional response from the jury. Further, the district court's careful limiting instruction minimized any prejudice to petitioner. See Shannon v. United States, 512 U.S. 573, 585 (1994)



(it is "the almost invariable assumption of the law that jurors follow their instructions"); see, e.g., Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (limiting instruction regarding purposes for which evidence of prior convictions may be used); Spencer v. Texas, 385 U.S. 554, 561 (1967) (same).[7]

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[7] Petitioner argues (Pet. 11-16) that the evidence was unduly prejudicial because it reflected not only the prior conviction, but also stated that petitioner had violated probation, listed several aggravating factors, and stated that there were no mitigating factors in his case. Pet. App. 47-49. These claims, however, are reviewable only for plain error because petitioner neither raised appropriate objections before the trial court nor requested redaction of the document evidencing his conviction. Pet. App. 29; Fed. R. Crim. P. 52(b). Even where plain error is detected, moreover, appellate courts will reverse only where "the forfeited error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Johnson v. United States, 117 S. Ct. 1544, 1550 (1997). Where, as here, the evidence of guilt is overwhelming -- two tellers identified petitioner as the robber and petitioner's own confession was introduced as well -- such an effect cannot be found. Ibid. Besides, it seems evident that there was no error, much less a less plain error affecting substantial rights. Notwithstanding petitioner's reliance (Pet. 16) on Old Chief v. United States, 117 S. Ct. 644 (1997), Old Chief held that Fed. R. Evid. 403 requires exclusion of a judgment of conviction in a prosecution for possession of a firearm by a convicted felon only if the defendant offers to concede a prior conviction and the only purpose of the evidence is to prove the element of prior conviction. Here, petitioner did not concede the prior conviction or the use of intimidation in his prior robbery, and the evidence was properly admitted to show intentional intimidation.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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